

The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.

Paper No. 86

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte HAROLD A. MCMASTER,
NORMAN C. NITSCHKE,
DEXTER H. MCMASTER, and RONALD MCMASTER

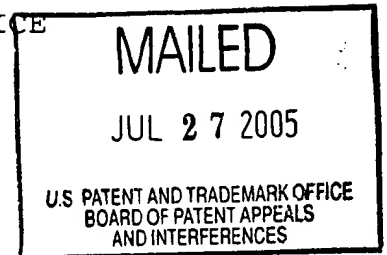
Appeal No. 2005-0464
Application No. 08/655,853

ON BRIEF

Before NASE, KRATZ and PAWLIKOWSKI, Administrative Patent Judges.
KRATZ, Administrative Patent Judge.

REMAND PURSUANT TO 37 CFR § 41.50(a)(1)

This remand to the examiner pursuant to 37 CFR § 41.50(a)(1) (effective September 13, 2004, 69 Fed. Reg. 49960 (August 12, 2004), 1286 Off. Gaz. Pat. Office 21 (September 7, 2004)) is made for further consideration of a rejection. Accordingly, 37 CFR § 41.50(a)(2) applies if a supplemental examiner's answer is written in response to this remand by the Board.



THE REJECTION UNDER APPEAL

Claim 27 stands rejected under 35 U.S.C. § 251 as being an improper recapture of broadened claimed subject matter surrendered in the application for the patent upon which the present reissue is based. As advanced by the examiner in the answer and supplemental answer, the basis for the rejection is found in the final action (Paper No. 73) mailed March 09, 2001. As explained by the examiner at pages 3 and 4 of that referred to final rejection, the basis of the rejection is as follows:¹

A broadening aspect is present in the reissue which was not present in the application for patent. The record of the application for the patent shows that the broadening aspect (in the reissue) relates to subject matter that applicant previously surrendered during the prosecution of the application. Accordingly, the narrow scope of the claims in the patent was not an error within the

¹ In the final rejection passages quoted herein, the examiner refers to cancelled claims 12-14 using an incorrect Application No. "07/083685" rather than the correct Application No. 07/083,675, which issued as U.S. Patent No. 4,822,398. That application was a parent application of Application No. 07/249,718 (now U.S. Patent No. 4,883,527), which later filed application was styled as a continuation application of the previously filed Application No. 07/083,675. U.S. Patent No. 4,883,527 is the patent which is the subject of the present reissue application. A review of both of the above-noted patents, including the specification and drawing figures of each, reveals that the later filed Application No. 07/249,718 includes, prima facie, subject matter not present in the earlier filed application notwithstanding the "continuation" designation assigned to the later filed application.

meaning of 35 U.S.C. § 251, and the broader scope surrendered in the application for the patent cannot be recaptured by the filing of the present reissue application. Accordingly, the narrow scope of the claims in the patent was not an error within the meaning of 35 U.S.C. § 251, and the broader scope surrendered in the application for the patent cannot be recaptured by the filing of the present reissue application.

8. In the instant case, the patented claims were to a glass bending and tempering apparatus. Claim 27 is directed to an apparatus for uniformly tempering a glass sheet. Claims 12-14 of 07/083685 were directed to a glass sheet tempering apparatus. Those three claims were cancelled in response to a rejection under 35 U.S.C. 102(e) as being anticipated by Kahle (US [Pat. No.] 4376643) and therefore surrendered. **Furthermore, the specification of US Pat. 4,822,398 describes prior art apparatus for bending only or for tempering only and states as an object of the patented invention the provision of an apparatus for bending and tempering sheet glass at one station.** It is clear that the improvement of the '398 patent was meant to be the addition of bending functionality to a single station which previously only functioned as a tempering apparatus.

In response to arguments submitted by appellants in a reply dated February 12, 2001, the examiner further asserts (final action, page 4) that:

In addition, the broadening reissue claims are broader in some aspects but narrower in other aspects than the claims cancelled from the patent application. The narrower aspects are not related to the original rejection over Kahle. The omission of any means for bending the glass sheet amounts to a broadening aspect. Since the rejection over Kahle applied only to the

cancelled claims containing no bending means, the broader aspect is germane to the prior art rejection over Kahle.

APPELLANTS' ARGUMENT

Appellants' arguments against this rejection are set forth in the brief (filed September 10, 2001) and the reply brief (filed December 17, 2001). Appellants assert that cancellation of claims in a parent application is not conclusive proof that applicants intended to surrender the subject matter of those claims. This is further evidenced, according to appellants, by the title employed in the filing of the "continuation" application that did not include the term "bending" therein and further based on the object of the invention included at column 2, lines 38-42 of the patent that issued on the "continuation" application.

In addition, appellants maintain that the rejected claim in the reissue application before us is considerably narrower in scope than any of the cancelled claims 12-14 in a manner such that the recapture rule does not apply. In particular and as one example, appellants note (brief, page 15) that rejected claim 27 of this reissue application requires "an actuator connected to a lower platen so that the quench tubes of the lower platen are moveable, as a glass sheet is bent, to conform the quench

openings in the tubes to the shape of the bent glass sheet," which limitation results in claim 27 being considerably narrower in scope than any of the cancelled claims that did not require an actuator to move quench tubes as a glass sheet is bent. In this regard, appellants argue that there is no evidence that appellants intended to surrender the subject matter of claim 27 of this reissue application.

In other words, appellants seemingly perceive that the examiner is basically applying a "per se" recapture type analysis with respect to the broadened reissue claim 27 rather than an appropriate analysis based on the recapture test as explained by our reviewing court in In re Clement, 131 F.3d 1464, 1468-70, 45 USPQ2d 1161, 1164-65 (Fed. Cir. 1997) "and its progeny" (reply brief, page 4).

Appellants reproduce 35 U.S.C. § 251 at page 11 of their brief, which statute provides, in part, for allowing a patent to be corrected through the reissue procedure where a patentee may correct errors such as "claiming more or less than he had a right to claim." 35 U.S.C. § 251 (underlining added). On balance, it appear to be appellants view that the examiner's approach in applying the stated rejection is inconsistent with the fact specific analytical approach adopted by the courts under the

recapture rule. By failing to present a claim substantially corresponding to claim 27 of this reissue application during prosecution of U.S. patent application No. 07/249,718, appellants assert that they claimed less than they had a right to claim, and are attempting to correct this error by securing a different claim scope that does not recapture the same or a broader claim scope than may have been "surrendered" during prosecution of the parent application.

PROSECUTION HISTORY OF PATENT

Application No. 07/249,718 was filed on September 27, 1988 with sixteen claims as a continuation application of previously filed Application No. 07/083,675 filed on August 07, 1985. Independent claims 1, 15 and 16 read as follows:

1. A glass bending and tempering apparatus comprising: a first platen for receiving a heated glass sheet to be bent; said first platen being deformable and including an actuator for deforming said platen from a planar shape to a bent shape; said first platen including quench openings throughout the extent thereof; said quench openings of the first platen movable therewith during the deformation of the platen; a second platen having quench openings throughout the extent thereof and opposing the first platen in spaced relationship with the glass sheet therebetween; said actuator being constrainable and having the ability to lift portions of said first platen a controlled distance to form the desired bent shape in the glass sheet; and quenching gas being supplied to the quench openings of both

platens and thereby to both sides of the glass sheet to temper the bent glass sheet between the platens.

15. A glass bending and tempering apparatus comprising: a first platen for receiving a heated glass sheet to be bent; said first platen being deformable and including an actuator for deforming said platen from a planar shape to a bent shape; said first platen including quench openings throughout the extent thereof; said quench openings of the first platen movable therewith during the deformation of the platen; a second platen having quench openings throughout the extent thereof and opposing the first platen with the glass sheet therebetween; a support mounting said platens at upper and lower locations with respect to each other; said actuator being constrainable and having the ability to lift portions of said first platen a controlled distance to form the desired bent shape in the glass sheet; said lower platen including deformable drive shafts, drive wheels mounted on the drive shafts to engage the heated glass sheet and provide movement thereof during platen deformation that provides the bending, and quench tubes that define the quench openings of the lower platen and rotatably support the drive shafts thereof such that the drive wheels move the heated glass sheet during the bending and quenching; said upper platen including idler shafts, idler wheels mounted on the idler shafts to engage the heated glass sheet and to rotate with movement of the glass sheet, and quench tubes that define the quench openings of the upper platen and rotatably support the idler shafts; and quenching gas being supplied to the quench openings of both platens and thereby to both sides of the glass sheet to temper the bent glass sheet between the platens.

16. A glass bending and tempering apparatus comprising: a first platen for receiving a heated glass sheet to be bent; said first platen being deformable and including an actuator for deforming said platen from a planar shape to a bent shape; said first platen including quench openings throughout the extent thereof; said quench openings of the first platen movable therewith

during the deformation of the platen; a second platen having quench openings throughout the extent thereof and opposing the first platen with the glass sheet therebetween; a support mounting said platens at upper and lower locations with respect to each other; said second platen including an actuator for raising and lowering said second platen with respect to said first platen; at least one template mounted above said upper platen; said second platen being pressed against said template as the first platen is deformed from a planar shape to a bent shape to bend the heated glass sheet thereagainst said second platen; said second platen conforming to said template; said lower platen including deformable drive shafts, drive wheels mounted on the drive shafts to engage the heated glass sheet and provide movement thereof during platen deformation that provides the bending, and quench tubes that define the quench openings of the lower platen and rotatably support the drive shafts thereof such that the drive wheels move the heated glass sheet during the bending and quenching; said upper platen including idler shafts, idler wheels mounted on the idler shafts to engage the heated glass sheet and to rotate with movement of the glass sheet, and quench tubes that define the quench openings of the upper platen and rotatably support the idler shafts; and quenching gas being supplied to the quench openings of both platens and thereby to both sides of the glass sheet to temper the bent glass sheet between the platens.

In the Ex parte Quayle first Office action (mailed January 24, 1989), all of the claims were indicated as being allowable by the examiner. Thus, no claims were rejected in Application No. 07/249,718 and the claims ultimately issued as filed in that so called "continuation" application.

However, during the prosecution of the parent Application No. 07/083,675, the examiner issued a first office action that

included a § 102(e) rejection of original claims 12-14 thereof over Kahle (U.S. Patent No. 4,376,643) and a § 103 rejection of original claim 1 thereof over Kellar et al. (U.S. Patent No. 4,483,703). Original independent claims 10 and 11 were indicated as allowable by the examiner in that first office action and dependent claims 2-9 were objected to as depending from a rejected base claim but indicated as being allowable if rewritten in independent form. Subsequent to an interview between the examiner and a representative of applicant on April 13, 1988 during pendency of the parent application, the examiner prepared an "Examiner Interview Summary Record," Form PTOL-413 (Paper No. 3) wherein an apparent agreement was stated as:

To amend cl. 1 to reflect inventive concept of providing quench openings throughout both platens with one platen being deformable to shape glass sheet between both platens and permit "immediate" quenching of the sheet. To cancel claims 12-14.

Subsequent to that interview, an amendment was submitted by applicant (Paper No. 5) that included directions to cancel claims 12-14 and furnished an amended claim 1. Subsequent to that amendment, the application was allowed by the examiner (Paper No. 6).

Original claims 1, 2, and 10-14 of parent Application No. 07/083,675 are reproduced below:

1. A glass bending and tempering apparatus comprising: a pair of opposed bending platens for receiving a heated glass sheet to be bent therebetween; at least one of the bending platens being deformable and including an actuator for deforming the platen from a planar shape to a bent shape to bend the heated glass sheet; and said one platen including quench openings that move therewith during the deformation of the platen and subsequently supply quenching gas to temper the bent glass sheet.

2. An apparatus as in claim 1 further including supports that mount the opposed bending platens at upper and lower locations with respect to each other, the lower bending platen being deformable and having a connection to the actuator so as to deform the lower platen from a planar shape to the bent shape, the upper bending platen being conformably deformable to the shape of the lower platen to bend the heated glass sheet therebetween, and both of said platens including quench openings that move therewith during the deformation of the platens and subsequently supply quenching gas to temper the bent glass sheet.

10. A glass bending and tempering apparatus comprising: a pair of opposed bending platens at upper and lower locations with respect to each other for receiving a heated glass sheet to be bent therebetween; the lower bending platen being deformable and including an actuator for providing deformation thereof from a planar shape to a bent shape; the upper bending platen being conformingly deformable to the shape of the lower platen to bend the heated glass sheet therebetween; the lower platen including deformable drive shafts, drive wheels mounted on the drive shafts to engage the heated glass sheet and provide movement thereof during platen deformation that provides the bending, and quench tubes that define quench openings of the lower platen and rotatably support the drive shafts thereof such that the drive wheels move the heated glass sheet during the

bending; the upper platen including idler shafts, idler wheels mounted on the idler shafts to engage the heated glass sheet and to rotate with movement of the glass sheet, and quench tubes that define quench openings of the upper platen and rotatably support the idler shafts; the quench openings being movable with the platens during the deformation of the platens and for subsequently supplying quench gas to temper the bent glass sheet.

11. A glass bending and tempering apparatus comprising: a pair of opposed bending platens at upper and lower locations with respect to each other for receiving a heated glass sheet to be bent therebetween; spacer wheels adjustably mounted to the platens that keep separate the opposed platens so that the heated glass sheet can be introduced therebetween; the lower bending platen being deformable and including an actuator for providing deformation thereof from a planar shape to a bent shape; the upper bending platen being conformingly deformable to the shape of the lower platen to bend the heated glass sheet therebetween; the lower platen including deformable drive shafts, reversibly driven drive wheels that are mounted on the drive shafts to engage the heated glass sheet and provide movement thereof during platen deformation that provides the bending, and quench tubes that define quench openings of the lower platen and rotatably support the support shafts thereof such that the drive wheels move the heated glass sheet during the bending; the upper platen including idler shafts, idler wheels mounted on the idler shafts to engage the heated glass sheet and to rotate with movement of the glass sheet, and quench tubes that define quench openings of the upper platen and rotatably support the idler shafts; the quench openings being movable with the platens during the deformation of the platens and for subsequently supplying quench gas to temper the bent glass sheet.

12. A glass sheet tempering apparatus comprising: a pair of opposed platens between which a heated glass sheet is received; each platen including a plurality of quench tubes that are spaced from each other; and each quench tube having quench openings through which quenching gas is supplied for impingement with the glass sheet to perform the tempering, the spent quenching gas escaping between the spaced quench tubes to prevent the build-up of back pressure.

13. A glass sheet tempering apparatus as in claim 12 wherein the opposed platens are positioned at upper and lower positions, and further including a conveyor for conveying the glass sheet between the upper and lower platens.

14. A glass sheet tempering apparatus as in claim 13 wherein the conveyor includes spaced wheels mounted on the quench tubes of the lower platen, and the glass sheet being supported for conveyance by the spaced wheels on the quench tubes of the lower quench tubes.

Independent claim 1 (amended claim 1 without underlining and brackets to highlight additions and deletions) of U.S. Patent No. 4,822,398, reads as follows:

1. A glass bending and tempering apparatus comprising: a deformable platen for receiving a heated glass sheet to be bent; said deformable platen including an actuator for deforming the platen from a planar shape to a bent shape to bend the heated glass sheet; said deformable platen including quench openings throughout the extent thereof; said quench openings of the deformable platen moving therewith during the deformation of the platen to the bent shape; another platen that has quench openings throughout the extent thereof and opposes the bent deformable platen with the bent glass sheet therebetween; and quenching gas being supplied to the quench openings of both platens and thereby to both sides of the glass sheet to temper the

bent glass sheet between the platens.

THE REJECTED CLAIMS

Claim 27, the sole claim remaining on appeal, reads as follows:

27. An apparatus for uniformly tempering a glass sheet comprising:
opposed lower and upper platens each of which includes elongated quench tubes which extend in a spaced apart relationship to each other in the direction of conveyance of the glass sheet and have quench openings; the lower platen having deformable drive shafts which extend between the elongated quench tubes and are oriented to be generally transverse to the direction of travel of the glass sheet, and which deformable drive shafts are rotatably supported by those quench tubes, and the lower platen also having drive wheels supported on the deformable drive shafts thereof at spaced locations to engage and move the glass sheet; an actuator connected to the lower platen so the quench tubes are movable as a glass sheet is bent to generally conform the tubes to a desired bent shape of a glass sheet; and means to supply quenching gas through the quench tubes to uniformly temper a glass sheet therebetween.

RECAPTURE UNDER 35 U.S.C. § 251

A precedential opinion concerning a reissue recapture rejection under 35 U.S.C. § 251 was entered May 29, 2003 in Ex parte Eggert, 67 USPQ2d 1716 (Bd. Pat. App. & Int. 2003). In Eggert, the majority opinion applied the fact-specific analysis set forth in In re Clement, 131 F.3d 1464, 1468-71 45 USPQ2d 1161, 1164-66 (Fed. Cir. 1997), determined that under the facts

and circumstances before it, the "surrendered subject matter" was claim 1 of Eggert as that claim existed prior to the post-final rejection amendment that led to the allowance of claim 1 in the original patent, and decided that reissue claims 15-22 of Eggert were not precluded (i.e., barred) by the "recapture rule." 67 USPQ2d at 1730-33.²

The Federal Circuit in Clement set forth a three step process for determining if the recapture doctrine should be applied against claims in a reissue application.

The first step in applying the recapture doctrine is to determine whether and in what "aspect" the reissue claims are broader than the patent claims. For example, a reissue claim that deletes a limitation or element from the patent claims is broader in that limitation's aspect.

The second step is to determine whether the broader aspects of the reissue claims relate to surrendered subject matter. To determine whether the appellants have surrendered particular subject matter, one must look to the prosecution history for

² The examiner's response to an earlier remand set forth in the supplemental answer is not well taken in that it offers no detailed comparative analysis but merely a conclusion that the Ex parte Eggert decision is not applicable to the facts of this appeal.

arguments and changes to the claims made in an effort to overcome a prior art rejection.

The third step is that once it is determined that the appellants have surrendered the subject matter of the canceled or amended claim, it must then be determined whether the surrendered subject matter has crept into the rejected reissue claims. Comparing the reissue claim with the canceled claim is one way to do this.³ If the scope of the reissue claim is as broad as or broader than the canceled or amended claim in all aspects, then the recapture doctrine bars the claim. In contrast, a reissue claim narrower in scope than the canceled or amended claim in all aspects (i.e., a claim setting forth all the limitations of the canceled or amended claim and adding a further narrowing limitation) escapes the recapture doctrine entirely. However, if the reissue claim is broader than the canceled or amended claim in some aspects, but narrower than the canceled or amended claim

³ In re Wadlinger, 496 F.2d 1200, 1204, 181 USPQ 826, 830 (CCPA 1974).

in others, then the broadening aspects of the reissue claim must be balanced against the narrowing aspects of the reissue claim.⁴

ACTION

In the recapture rejection before us in this appeal, the examiner has not presented an in depth comparison and analysis of the subject matter of claim 27 with respect to the "surrendered subject matter." Instead, the examiner has generally compared claim 27 to the allowed claims that issued as the patent and cancelled claims 12-14 without a fact specific analysis, as

⁴ If the reissue claim is as broad as or broader in an aspect germane to a prior art rejection, but narrower in another aspect completely unrelated to the rejection, the recapture doctrine bars the claim. See Mentor Corp. v. Coloplast Inc., 998 F.2d 992, 996, 27 USPQ2d 1521, 1525 (Fed. Cir. 1993). If the reissue claim is narrower in an aspect germane to prior art rejection, and broader in an aspect unrelated to the rejection, the recapture doctrine does not bar the claim. See Ball Corp. v. United States, 729 F.2d 1429, 1435, 221 USPQ 289, 294 (Fed. Cir. 1984); Ex parte Eggert, 67 USPQ2d 1716, 1731-32, (Bd. Pat. App. & Int. 2003). In Clement, the court found that the reissue claim was both narrower than the canceled claim in an aspect germane to prior art rejection and broader than the canceled claim in an aspect germane to prior art rejection. The Clement court concluded that, "[o]n balance, reissue claim 49 is broader than it is narrower in a manner directly pertinent to the subject matter that Clement surrendered throughout the prosecution" and thus was impermissible under the recapture rule. 131 F.3d at 1471, 45 USPQ2d at 1166. In Pannu v. Storz Instruments Inc., 258 F.3d 1366, 1370-71, 59 USPQ2d 1597, 1600 (Fed. Cir. 2001), the court also found that the narrowing aspects of the reissue claim were not enough to outweigh the broadening aspects of the reissue claim.

required. In that regard, assuming that cancelled claims 12-14 of Application No. 07/083,675 represents surrendered subject matter for the patent undergoing this reissue application procedure, the paragraph bridging pages 3 and 4 of the supplemental answer merely provides conclusions without explaining in detail how claim 27 of this application is as broad as or broader than any of the cancelled claims 12-14 of Application No. 07/083,675. The examiner's opinion suggesting that the surrendered subject matter relates to glass bending and that any claim that does not include glass bending is subject to a recapture rejection is clearly off the mark. For example, the cancellation of claim 12 of Application No. 07/083,675 in the face of a prior art rejection represents surrender, at most, of subject matter of a scope substantially the same as or broader than that of the cancelled claim, not a surrender of any subject matter not including glass bending. See Ball Corp. v. United States, 729 F.2d 1429, 1436, 221 USPQ 289, 295 (Fed. Cir. 1984).

Moreover, comparing cancelled claim 12 with appealed claim 27, for example, we observe that appealed claim 27 includes a number of narrowing limitations as outlined by appellants at pages 14 and 15 of the brief. The examiner's conclusion that the narrowing aspects are not germane to the prior art rejection of

that cancelled claim is not supported by any analysis of each of those narrowing limitations. For instance, the examiner has not properly taken into account the claim 27 limitation respecting "an actuator connected to the lower platen so the quench tubes are movable as a glass sheet is bent to generally conform the tubes to a desired bent shape of a glass sheet" as a narrowing limitation that may be germane to the prior art rejection.⁵ As such, the examiner has not set forth a prima facie case to support a recapture rejection.

We remand this application to the examiner to determine whether the recapture rejection under 35 U.S.C. § 251 is appropriate. In making this determination, the examiner must follow the three-step process established by In re Clement, 131 F.3d at 1468-71, 45 USPQ2d at 1164-66. The first step is to determine whether and in what aspect(s) the reissue claim 27 is broader than the patent claims. The second step is to determine whether the broader aspect(s) of that reissue claim relates to

⁵ For example, a narrowing limitation is certainly germane to a prior art rejection if it overcomes that rejection. Claim 27 is not rejected on prior art, as were cancelled claims 10-12 of the parent application. Thus, claim 27 presumably contains some narrowing limitation that overcomes that previously made prior art rejection. No other explanation of the lack of the presentation of a rejection of claim 27 over the prior art that cancelled claims 10-12 of the parent application were subjected to a rejection over has been furnished by the examiner.

surrendered subject matter. Finally, the third step is to determine whether that reissue claim has been materially narrowed in other respects to avoid the recapture rule.

While the examiner generally performed the first step and furnished conclusions regarding the steps in general, the examiner has not detailed the performance of each of the first, second and third steps. For example, to properly perform the second step the examiner must determine what subject matter constitutes "surrendered subject matter." "Surrendered subject matter" is subject matter that applicant has admitted was not patentable over the prior art such as by deliberately canceling or amending a claim to overcome prior art.⁶ If the reissue claim is as broad as or broader than the canceled or amended claim [the

⁶ Claim 1 prior to the amendment and cancelled claims 12-14 of Application No. 07/083,675 may constitute surrendered subject matter since these claims were subject to a prior art rejection and subsequently either amended to overcome the prior art rejection or cancelled. While those claim cancellations and that claim amendment occurred during the prosecution of the parent Application No. 07/083,675, that prosecution history may be fairly considered to be part of the record of the patent that is the subject of this reissue application. See, e.g., In re Clement, 131 F.3d at 1466; 45 USPQ2d at 1162. Here, the examiner has not undertaken any analysis of appealed claim 27 relative to surrendered subject matter as may be represented by claim 1 as it existed prior to the amendment that overcame the examiner's rejection thereof.

surrendered subject matter] in all aspects, the recapture rule bars the claim. If it is narrower than the canceled or amended claim [the surrendered subject matter] in all aspects, the recapture rule does not apply. If the reissue claim is broader than the canceled or amended claim [the surrendered subject matter] in some aspects, but narrower than the canceled or amended claim [the surrendered subject matter] in other aspects, then the examiner must determine if each broadening aspect and narrowing aspect is or is not germane to a prior art rejection, then the examiner must balance the narrowing aspects against the broadening aspects to determine if the recapture rule bars claim 27. See In re Clement, 131 F.3d at 1468-71, 45 USPQ2d at 1164-66.

CONCLUSION

The application has been remanded to the examiner for further consideration as set forth above.

REMANDED

PFK/sld

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Application No. 08/655,853

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